Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

JAMES TAFTSIOU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether or not the trial court erred in denying defense motion to include lesser offense under Rule 31(c) of the Federal Rules of Criminal Procedure.

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OPINIONS BELOW

An opinion was issued in this matter on May 19, 1998, in which the United States Court of Appeals for the Third Circuit denied Petitioner's Appeal from sentence and conviction after trial in United States District Court in the District of New Jersey. The Court of Appeals Opinion appears as Appendix A and the District Court Judgment as Appendix C. Petitioner did not request a panel rehearing nor a rehearing *en banc*.

STATEMENT OF JURISDICTION

On May 19, 1998, the United States Court of Appeals for the Third Circuit affirmed petitioner's sentence and conviction in the United States District Court of the District of New Jersey. Petitioner did not request a panel rehearing or a rehearing *en banc*. This petition, a criminal matter, was filed within ninety (90) days of that judgment in compliance with Supreme Court Rule 13(1). This petition was returned to counsel with instructions to change printing formats, but counsel had moved. After receipt of the papers in mid September, counsel was assured that the time for refiling would be extended.

The jurisdiction to review the May 19, 1998 judgment is conferred on this Court by 20 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is the Fifth Amendment to the United States Constitution which provides in pertinent part:

> [No person shall] be deprived of life liberty, or property, without due process of law.

STATEMENT OF THE CASE

On May 28, 1995 Secret Service Agents raided a motel in Atlantic City, New Jersey at which time several individuals were arrested while in possession of counterfeited $50.00 and $100.00 FRNs. Among the individuals arrested was a person by the name of Mustafa Mahamoud. Mr. Mahamoud was arrested while in possession of over $1,600 in genuine currency and $6,000 in counterfeited currency. He also had in his possession a stolen cellular phone that revealed that he made telephone calls to Queens, New York to a telephone number registered to Kadri Taftsiou, who was later identified as the brother of petitioner Bardul Taftsiou and uncle of co-defendant James Taftsiou.

Following his arrest Mustafa Mahamoud decided to cooperate with the Secret Service. He informed the Secret Service at that time and did in fact later testify at trial that the paper notes that he had in his possession when arrested in Atlantic City on May 28, 1995 was given to him by Bardul Taftsiou. Mr. Mahamoud testified that he received these paper notes from Bardul Taftsiou with the understanding that he would pay back to Bardul Taftsiou a percentage of the paper notes that he was successfully able to pass in Atlantic City. Mr. Mahamoud testified that the paper notes that he received from Bardul Taftsiou were to be used exclusively in casino slot machines in Atlantic City. These notes were not to be used for purchasing items or for passing from one individual to another, but were specifically made and utilized for the purpose of inserting them into the bill validator in the casino slot machines.

The essence of the utilization of these counterfeited notes was explained by Mr. Mahamoud as well as several witnesses for the Government including Secret Service Special Agent Brian Donovan. The paper notes that were the subject of the

arrest of Bardul Taftsiou and James Taftsiou were made with the use of a computer and two different types of printers. The important aspects of these notes was that the front was printed with metallic ink. When one of the notes was placed into a bill validator (which is nothing more than a change machine) in a casino slot machine, the validator would read the bill as a genuine $50.00 or $100.00 FRN and give the player the appropriate credits on the slot machine. For example, if someone would insert a counterfeited $100.00 FRN the bill validator would read the magnetic signature on the front of the counterfeit and believe that it was a genuine $100.00 FRN. The validator would then communicate electronically to the slot machine and give the player 100 $1.00 credits on the slot machine that the player could utilize to either play the machine or cash out and receive 100 tokens. The tokens could be exchanged at the casino cashier for cash. The Secret Service investigation revealed that a total of $1.2 million of similar counterfeited notes were passed in various casinos in Atlantic City and Nevada. Virtually every single note that was passed was passed through a casino slot machine bill validator. Virtually none of these paper notes were used to fool or defraud a person as a result of a hand-to-hand transfer, but rather were used exclusively, and in fact made exclusively, to be inserted into casino slot machines. Testimony from Secret Service experts opined that these notes were allied. The Secret Service experts testified that they were able to determine that various parts of each of the notes had a common origin, and that the notes were all printed from the same type of printer (a Tektronix Model 540 Color Printer and an unidentified Laser Printer).

Following the arrest of Mr. Mahamoud the Secret Service conducted an investigation in which they found that an individual identified as James Taftsiou earlier in the year purchased a Tektronix Model 540 Color Printer, two high quality paper cutters, and other computer equipment. During a

search of the Taftsiou's residence, the Secret Service found an elaborate high quality computer system. Witnesses testified that it was capable of producing the paper notes in this case, however, they did not find any printers or paper cutters that they believed were used to manufacture this currency.

Other witnesses that were produced by the Government included Elliot Vasquez who was arrested on November 10, 1997 passing these same paper notes in Atlantic City. Vasquez agreed to cooperate with the Secret Service. He testified at trial that he was driven to Atlantic City by James Taftsiou, who gave him the paper notes with which he was arrested. Vasquez later testified that there was an understanding that he would split the proceeds with James Taftsiou after the paper notes were inserted into the casino slot machines. Vasquez was instructed by James Taftsiou that these bills were to be used only in the casino slot machines and not for any other purpose.

As a result of the information gathered by the Secret Service, a surveillance was conducted on the Taftsiou residence in November 1995. On November 18, 1995 surveillance established that the Taftsiou family drove from New York to Atlantic City. The family driven by petitioner Bardul Taftsiou included Nazmije Taftsiou (Bardul Taftsiou's wife), Arzija Taftsiou (Bardul Taftsiou's mother), Julie Hasimi (Bardul Taftsiou's daughter), and Ilim Asimi (Julie Hasimi's brother-in-law). Upon their arrival in Atlantic City, surveillance was continued by the Secret Service both visually and with the aid of casino cameras.

The testimony of the surveillance agents as well as the video tapes reveal that all of the Taftsiou family were playing the slot machines except Bardul Taftsiou. He stood behind his wife and mother while they played the slot machines, then collected the tokens. After approximately one hour of playing,

the Secret Service arrested the defendants and retrieved from the machines they were playing several counterfeited $50.00 and $100.00 FRNs. A search of the car in which they traveled to Atlantic City revealed an additional $4,500 in paper notes hidden in two separate locations in the car. These paper notes were identical to those found in the slot machines played by other members of the family.

At the conclusion of the evidence, defense counsel motioned pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal because the Government failed to establish that the defendants violated all the elements of 18 U.S.C. §§ 472 and 473. Counsel argued that the evidence revealed that the paper notes in question did not rise to the level of actual "counterfeit currency" because the degree of similitude to genuine Federal Reserve Notes was not sufficient. Counsel also argued that the notes were at best akin to paper slugs that were intended to be used, and were in fact, exclusively used only in bill validators in casino slot machines. Counsel therefore argued that the offensive conduct of petitioner was subject to the jurisdiction of 18 U.S.C. § 491, which was not charged. The trial court denied this motion.

Prior to the submission of the case to the jury, defense counsel requested that the trial court charge the lesser included offense of 18 U.S.C. § 491. Counsel argued that the paper notes in this case were not sufficiently similar to genuine currency as required the 18 U.S.C. §§ 472 and 473, but that it was reasonable for a jury to conclude that the paper notes were more akin to paper slugs that are prohibited under 18 U.S.C. § 491. Section 491 is a misdemeanor, rather then the more serious charges contained in 18 U.S.C. §§ 472 and 473. This argument was denied by the trial court, and a lesser included charge was not given.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED TO DETERMINE IF PETITIONER'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS VIOLATED WHEN THE TRIAL COURT ERRONEOUSLY DENIED PETITIONER'S REQUEST UNDER FED. R. CRIM. P. 31(c) THAT THE COURT CHARGE A VIOLATION OF 18 U.S.C. § 491 AS A LESSER INCLUDED OFFENSE OF 18 U.S.C. §§ 472 AND 473.

Petitioner requested, pursuant to Fed. R. Crim. P. 31(c), that the trial court charge a violation of 18 U.S.C. § 491 as a lesser included offense of 18 U.S.C. §§ 472 and 473. By memorandum opinion entered February 25, 1997 the trial court denied the motion. The reasoning below did correctly recognize that the "elements" test has precluded the "inherent relationship" test in decisions concerning lesser included offenses. The trial court failed, however, to correctly apply the element test in the instant case.

Fed. R. Crim. P. 31(c) provides, in relevant part, that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." In applying Fed. R. Crim. P. 31(c), the trial court relied upon the "elements" test as stated by the Supreme Court:

> one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

Schmuck v. United States, 489 U.S. 705, 716, 109 S. Ct. 1443, 1450 (1989).

The *Schmuck* court relied in part upon this Court's established rule that "[a] lesser included offense is one that does not require proof of any additional element beyond those required by the greater offense." *Government of Virgin Islands v. Bedford*, 671 F.2d 758 (3d Cir. 1982) citing *Blockenberger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 187 (1977).

The *Schmuck* court also relied in large part upon *Keeble v. United States*, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973), which held that

> it is now beyond dispute that the defendant is *entitled* to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.

Keeble, 412 U.S. 205, 208 (emphasis added). Other courts have held that a "district court has no discretion to refuse to give a lesser-included instruction if the evidence warrants the instruction and the defendant requests it." *United States v. Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993) *citing Guam v. Fejeran*, 687 F.2d 302, 305 (9th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1045, 103 S. Ct. 1444, 75 L. Ed. 2d 800 (1983); *United States v. Gibbs*, 904 F.2d 52, 58 (D.C. Cir. 1990). Failure to provide a jury with a lesser included offense instruction to which a defendant is entitled, has been labeled reversible error. *Baker*, 985 F.2d at 1259, *citing United States v. Levy*, 703 F.2d 791, 793 n.7 (4th Cir. 1983).

In the instant case, the trial court explained the result of its application of *Schmuck*'s elements test as follows:

> [I]t is clear that § 491 contains additional and/or different elements as compared to § 472 or § 473. For example, a conviction under § 491 requires that the defendant be found to be 18 years of age or over, a requirement not contained in either § 472 or § 473. In addition, § 491, at least as to paper intended to be used as currency, also requires that the offense involve some type of "lawful receptacle, depository, or contrivance designed to receive or be operated by lawful coins or other currency." This too is not a requirement of either § 472 or § 473.

The trial court's reasoning is faulty on a few levels. First, the court apparently considered subsection (a) of 18 U.S.C. § 491. Subsection (b), does not have the additional and/or different element of an age requirement, if in fact the age requirement is an element of the offense at all. Petitioner is unaware of any reason why the trial court failed to analyze 18 U.S.C. § 491 beyond its first subsection.

Second, the trial court appears to have been absorbed by the draconian nature of the "tests" to be applied in questions arising under Fed. R. Crim. P. 31(c), and ignored the rationale that applied to the Supreme Court cases. In the simplest terms, *Schmuck* stated that odometer tampering was not a lesser inclusion to mail fraud. Even without studying the statutes or reasoning of that court, the conclusion is clearly rational. The policy reason for implementing a rule that limits the availability of lesser inclusions is explained most artfully within the opinion of the *Schmuck* court. 489 U.S. at 717-20, 109 S. Ct. at 1451-53.

In the instant case, the only element that varies between statutes is that concerning a "contrivance designed to receive or to be operated by lawful coins or other currency." 18 U.S.C. § 491(b) (reproduced *supra*). In the simplest terms, § 491 concerns fooling a machine with something similar to currency, while §§ 472 and 473 concern fooling people with something similar to currency. Section 491 does not present an additional or different element at all, but a limit upon the element in §§ 472 and 473 requiring an intent to defraud. Petitioner posits that intending to defraud a machine is a lesser inclusion to intending to defraud a person. In further support of the connection, § 491 is a misdemeanor codified in short order within the same title and chapter of the United States Code as the two more serious offenses charged in this case.

The Third Circuit Court of Appeals rejected Petitioner's argument and affirmed his conviction.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the request for Writ of Certiorari be issued.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 19, 1998

Filed May 19, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5409

UNITED STATES OF AMERICA

v.

BARDUL TAFTSIOU,
Appellant

No. 97-5473

UNITED STATES OF AMERICA

v.

JAMES TAFTSIOU,
aka James Taft, aka Gezim Taftsiou
James Taftsiou,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. Nos. 95-cr-00681-1, 95-cr-00681-6)

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 18, 1998

Before: SLOVITER and GREENBERG, *Circuit Judges*,
and POLLAK, *District Judge**

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* Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

(Filed May 19, 1998)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Bardul Taftsiou was convicted in the United States District Court for the District of New Jersey of possessing, delivering, passing and conspiring to pass approximately $1 million in counterfeit Federal Reserve Notes. At the same trial, his son James Taftsiou was convicted of dealing and conspiring to pass approximately $1 million in counterfeit Federal Reserve Notes. On appeal, both defendants challenge their convictions and sentences, raising the same issues. For the reasons that follow, we will affirm.

I.

In late 1994, Bardul Taftsiou and his brother Kadri discussed with Mostafa Mahamoud the possibility of obtaining counterfeit United States currency, but ultimately Bardul decided to print his own counterfeit notes with the help of his 33-year old son James. In March and April of 1995, James Taftsiou, using a false identity, purchased an extremely high capability computer for $7,300, a top-of-the-line color printer for $8,000-9,000 and a very large,

accurate commercial paper cutter. With this equipment, father and son began printing double-sided full-color counterfeit $100 notes. Several months later, they also began printing counterfeit $50 notes. Both denominations of counterfeit bills were printed with magnetic ink so that they would be accepted by slot machine bill validators in Atlantic City, New Jersey and Las Vegas, Nevada.[1]

After the printing operations were underway, Bardul gave Mahamoud a bag of counterfeit notes and suggested that he recruit a group of people to go to Atlantic City over Memorial Day weekend to use the notes in casino slot machines. Once in Atlantic City, Mahamoud and the others would insert the notes in various slot machines, play the machine for a short period of time or not at all, hit the "cash out" button and exchange the tokens paid out by the machine for genuine currency. Mahamoud would then bring the genuine currency to Bardul and Kadri Taftsiou in exchange for more counterfeit notes.

On May 28, 1995, during the Memorial Day weekend trip, one of the men in Mahamoud's group successfully passed three of the counterfeit $100 bills to a prostitute, who informed the police when she realized the bills were counterfeit. Thereafter, both genuine and counterfeit notes were found in Mahamoud's room and on his person, some of which matched the bills given to the prostitute.

An additional $55,000 of the Taftsious' counterfeit notes was passed in slot machines in various Atlantic City casinos over the Memorial Day weekend. Secret Service agents testified that they could trace the notes to the Taftsiou group because they had never before encountered notes exactly like those recovered from Mahamoud and the others during the Memorial Day weekend. The notes exhibited several distinct patterns that did not appear

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1. Bill validators allow a casino's customers to play slot machines using paper currency. Once a customer inserts a bill into the validator, the validator scans the bill for the presence of magnetic ink as used in genuine United States currency. If the bill is accepted, the customer can either play the machine or "cash out" and receive casino tokens redeemable for cash.

anywhere in the Secret Service's nationwide database of recovered counterfeit currency.

In the summer of 1995, James Taftsiou began passing the counterfeit notes in Las Vegas. On the July 4th weekend, James and his friend Bujar Musa were captured on casino surveillance videotapes passing the counterfeit notes in various slot machines. By July 13, 1995, the Secret Service in Las Vegas had received $79,000 of the Taftsious' counterfeit notes.

From June 1 through November 17, 1995, Secret Service agents apprehended fourteen individuals for passing the Taftsious' counterfeit currency in both Atlantic City and Las Vegas and collected over $325,000 of the Taftsious' notes. Those arrested included relatives, friends, friends of relatives and individuals randomly recruited by James Taftsiou to pass the counterfeit notes in the casinos.

Mahamoud began cooperating with the investigating authorities in October of 1995. Bardul and some of his family members were arrested in November 1995 at Tropworld Casino in Atlantic City where they passed counterfeit bills into slot machines while Bardul collected the casino tokens from them and exchanged them for genuine currency. The agents recovered $9,000 in both counterfeit and genuine currency from the arrestees, their car, and the slot machines they had been playing. James Taftsiou was subsequently arrested on February 6, 1996.

Count One of the five-count superseding indictment charged Bardul, James, Nazmije Taftsiou (Bardul's wife), Julie Hasimi (Bardul's daughter) and Ilim Asimi (Julie Hasimi's brother-in-law) with conspiring with each other and seventeen other named co-conspirators plus others known and unknown to buy, sell, exchange, transfer, deliver, pass, utter conceal and keep in their possession approximately $1 million in counterfeit $100 and $50 Federal Reserve Notes in violation of 18 U.S.C. §§ 371, 472 and 473.[2] Bardul and Nazmije Taftsiou, Julie Hasimi and Ilim Asimi were charged in Count Two with passing

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2. Arzija Taftsiou, Bardul's mother, was indicted with the others, but the charges against her were dismissed.

approximately 17 counterfeit $50 notes with intent to defraud in violation of 18 U.S.C. §§ 472 and 2, and in Count Three with possessing and concealing approximately 90 counterfeit $50 notes in violation of 18 U.S.C. §§ 472 and 2. Count Four charged James Taftsiou with dealing in approximately 60 counterfeited $50 notes in violation of 18 U.S.C. §§ 473 and 2. Count Five charged Bardul Taftsiou with dealing in approximately 17 counterfeit $50 notes, also in violation of 18 U.S.C. §§ 473 and 2. Approximately twenty other individuals were charged for related offenses in separate indictments.

Following a seven-week trial, Bardul and James Taftsiou were found guilty on all counts with which they had been charged. Nazmije Taftsiou and Julie Hasimi were acquitted. Bardul was then sentenced to four 51-month terms of imprisonment to be served concurrently, and James was sentenced to two concurrent 54-month terms. Both were ordered to pay $25,000 in restitution, but were given no fine. These consolidated appeals followed.

II.

A.

Appellants argue first that the district court erred in denying their motion for acquittal which they filed at the close of the government's case-in-chief. Defendants do not contest the relevant facts but argue that there was insufficient evidence to support a finding that they intended to pass the counterfeit notes to any *person* or that the notes appeared sufficiently genuine to be considered "counterfeit" within the meaning of 18 U.S.C. §§ 472 and 473. At the end of the trial, the district court denied the motion, finding that the "bills were two-sided. They were both $100's and $50's. They bore a close resemblance in terms of the images on both sides to a genuine bill, and they also bore a close resemblance to the color and colors found both on the backs and the fronts of genuine bills." App. at 143.

Our review is plenary and, in exercising that review, we must interpret the evidence in the light most favorable to

the government as the verdict winner. *See United States v. Rieger*, 942 F.2d 230, 232 (3d Cir. 1991).

Section 472 of Title 18 of the United States Code provides, in relevant part, that "[w]hoever, with intent to defraud, passes . . . or keeps in possession or conceals any . . . counterfeited . . . obligation . . . of the United States, shall be fined under this title or imprisoned not more than fifteen years, or both." 18 U.S.C. § 472. Section 473 provides in relevant part that "[w]hoever buys, sells, exchanges . . . any . . . counterfeited . . . obligation . . . of the United States, with the intent that the same be passed . . . as true and genuine, shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. § 473. Neither statute on its face requires that a defendant have intended to pass the counterfeit notes to a person or that the notes closely resemble genuine currency.

Over fifty years ago, however, this court held in *United States v. Lustig*, 159 F.2d 798 (3d Cir. 1947), *rev'd in part on other grounds*, 338 U.S. 74 (1949), that

> the proper test to be applied is whether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

Id. at 802.

Only those counterfeit notes that are sufficiently similar to genuine currency so as to meet this definition may be considered "counterfeit." *Id.* Since we issued *Lustig*, our reasoning and the language we employed there have been adopted by virtually every court that has addressed the issue. *See, e.g., United States v. Gomes*, 969 F.2d 1290 (1st Cir. 1992); *United States v. Ross*, 844 F.2d 187 (4th Cir. 1988); *United States v. Cantwell*, 806 F.2d 1463 (10th Cir. 1986); *United States v. Johnson*, 434 F.2d 827 (9th Cir. 1970).

Defendants argue that because the paper notes they circulated were not of high enough quality to pass hand-to-

hand, they could not be characterized as "counterfeit." They rely almost exclusively on the opinion of the United States Court of Appeals for the Fourth Circuit in *Ross*, 844 F.2d 187, where the $1 bill defendants were charged with counterfeiting was a one-sided photocopied black and white reproduction on plain white paper. The defendants had attempted to insert the photocopy into a change machine at a car wash. Their convictions under 18 U.S.C. §§ 471 and 472 were reversed on the ground that the reproduction was not sufficiently similar to genuine notes. According to the court, the photocopies were "patently fake," "obviously false and bogus," and could not be mistaken for genuine from "one hundred feet away." *Id.* at 189-90. In addition, the court pointed out that there had been no testimony that the reproduction had actually deceived anyone. *Id.* at 190.

The evidence in this case differs from that in *Ross*. Bardul's daughter Julie Hasimi testified that she believed the counterfeit notes were genuine, and there was evidence in the record that three of the bills had been successfully passed to at least one person. Supp. App. at 86. A Secret Service expert in the analysis of counterfeit currency testified that the Taftsious' bills were "average" and that she was aware of worse quality bills having been successfully passed in other cases. Supp. App. at 246A.

In addition to the testimony adduced at trial, physical examples of the Taftsious' counterfeit notes were admitted into evidence. *See* Addendum to Appellee's Br.; Gov't. Exh. 183, 220. Therefore, presumably each juror could touch and examine the notes and come to his or her own conclusion regarding the reasonableness of their being accepted by an honest, unsuspecting person. Thus, it was not improper for the district court to have described the bills on the record and to have commented that "the evidence speaks for itself." App. at 143. In doing so, the judge did not, as appellants claim, improperly weigh the evidence. The judge merely acknowledged that the jurors were entitled to examine and consider the Taftsious' notes in reaching their conclusion, based on the totality of the evidence, that the bills were sufficiently similar to genuine currency to be "counterfeit" within the meaning of 18 U.S.C. §§ 472 and 473.

Finally, we reject appellants' suggestion that the counterfeiting statutes at issue require them to have passed or intended to pass their notes to persons, as opposed to machines. Our decision in *Lustig* with its emphasis on whether the bills could deceive "an honest, sensible and unsuspecting person" was written in a time when machines were not regularly used to process money. There seems little reason why false bills that are successfully processed through machines, whether slot machines, vending machines or others, should not be treated the same for purposes of the counterfeiting statutes as false bills that were passed to a person. The intent to defraud is the same, as is the effect. The statutes themselves do not contain language requiring passing to a person. A slight clarification by Congress to expressly require treatment of counterfeit bills passed through machines equal to that of counterfeit bills passed to persons would eliminate any question of a different interpretation. However, we need not resolve this issue because the record before us is adequate for us to affirm the district court's denial of appellants' Rule 29 motion for judgment of acquittal even under the *Lustig* standard.

B.

Defendants next argue that the district court erred in refusing to charge a misdemeanor violation of 18 U.S.C. § 491 as a lesser included offense of the counterfeiting charges. Following some period of uncertainty as to the interpretation of Rule 31(c) of the Federal Rules of Criminal Procedure with respect to when a jury may convict a defendant "of an offense necessarily included in the offense charged," there are now some clear guidelines. A district court is required to charge an offense as a lesser included of a greater offense when requested if "the elements of the lesser offense are a subset of the elements of the greater offense." *United States v. Mosley*, 126 F.3d 200, 203 (3d Cir. 1997). On the other hand, "[w]here the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Schmuck v. United States*, 489 U.S. 705, 716 (1989). "This standard involves a textual comparison, looking solely to the

elements of the two offenses; inferences arising from the evidence and similarities as to the interests served by the statutes are not relevant." *Mosley*, 126 F.3d at 203-04 (citing *Schmuck*, 489 U.S. at 720).

In the case at bar, a most cursory review of the relevant statutory language reveals that the lesser offense of § 491 requires elements not required by §§ 472 and 473.[3] Namely,

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3. The full text of § 472 is as follows:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than fifteen years, or both.

18 U.S.C. § 472.

Section 473 provides in full:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 473.

The relevant subsections of the misdemeanor statute that the appellants contend the district court should have charged as a lesser included offense are as follows:

> (a) Whoever, being 18 years of age or over, not lawfully authorized, makes, issues, or passes any coin, card, token, or device in metal, or its compounds, intended to be used as money, or whoever, being 18 years of age or over, with intent to defraud, makes, utters, inserts, or uses any card, token, slug, disk, device, paper, or other thing similar in size and shape to any of the lawful coins or other currency of the United States or any coin or other currency not legal tender in the United States, to procure anything of value, or the use or enjoyment of any property or service from any automatic merchandise vending machine, postage-stamp machine, turnstile, fare box, coinbox telephone, parking meter or other lawful receptacle, depository, or contrivance designed to receive or to be operated by lawful coins or other currency of the United States, shall be fined under this title, or imprisoned not more than one year, or both.

§ 491 requires that a fraudulent card, slug or paper be used or intended to be used in a vending machine, stamp machine, turnstile, fare box, or other "contrivance designed to receive or to be operated by lawful coins or other currency of the United States." 18 U.S.C. § 491. Sections 472 and 473 have no such requirement.

Thus, if one were to pass counterfeit notes to a human being, the perpetrator could be convicted under § 472, but would not be guilty of having violated § 491. Likewise, one who buys or sells counterfeit notes could be convicted under § 472, but would not necessarily be guilty of having violated § 491. The mere coincidence that, in this case, defendants' conduct may have simultaneously violated §§ 472, 473, and 491 does not affect the Rule 31(c) analysis. *See Schmuck*, 489 U.S. at 716-17 (the "comparison is appropriately conducted by reference to the statutory elements of the offenses in question, and not . . . by reference to conduct proved at trial. . . ."). "[L]ooking solely to the elements of the two offenses," *Mosley*, 126 F.3d

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(b) Whoever manufactures, sells, offers, or advertises for sale, or exposes or keeps with intent to furnish or sell any token, slug, disk, device, paper, or other thing similar in size and shape to any of the lawful coins or other currency of the United States, or any token, disk, paper, or other device issued or authorized in connection with rationing or food and fiber distribution by any agency of the United States, with knowledge or reason to believe that such tokens, slugs, disks, devices, papers, or other things are intended to be used unlawfully or fraudulently to procure anything of value, or the use or enjoyment of any property or service from any automatic merchandise vending machine, postage-stamp machine, turnstile, fare box, coin-box telephone, parking meter, or other lawful receptacle, depository, or contrivance designed to receive or to be operated by lawful coins or other currency of the United States shall be fined under this title or imprisoned not more than one year, or both.

Nothing contained in this section shall create immunity from criminal prosecution under the laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

18 U.S.C. § 491.

at 203, § 491 is not a lesser included offense of §§ 472 and 473.

Accordingly, we will affirm the district court's denial of the Taftsious' Rule 31(c) motion to charge 18 U.S.C. § 491 as a lesser included offense of the counterfeiting violations of which they were convicted.

C.

Finally, the Taftsious challenge their sentences on two different grounds. First, they argue that the district court erred in enhancing their sentences by 11 levels pursuant to U.S.S.G. §§ 2B5.1(b)(1) on the ground that the "amount of loss" was allegedly unsubstantiated by the evidence. Second, they contend that the 11-level enhancement was improper in light of the poor quality of the notes.

Under the United States Sentencing Guidelines, a violation of 18 U.S.C. §§ 472 and 473 carries with it a base offense level of 9. U.S.S.G. § 2B5.1(a). "If the face value of the counterfeit items exceeded $2,000," the court should increase the offense level using the table in § 2F1.1. U.S.S.G. § 2B5.1(b)(1). That table provides for an increase of 11 levels where the value of the counterfeit items is between $800,000 and $1.5 million. U.S.S.G. § 2F1.1(b)(1)(L).

In this case, the Probation Office quantified the face value of the counterfeit notes attributable to these defendants at $1.2 million. At sentencing, the district court found by a preponderance of the evidence that the amount in issue for purposes of § 2F1.1 was between $800,000 and $1.5 million. Accordingly, following §§ 2B5.1 and 2F1.1, the court increased the Taftsious' offense level by 11 levels.

We review the district court's factual findings for clear error and may reverse those findings only where they are "completely devoid of a credible evidentiary basis or bear[ ] no rational relationship to the supporting data." *United States v. Haut*, 107 F.3d 213, 218 (3d Cir. 1997) (quoting *American Home Prod. Corp. v. Barr Labs., Inc.*, 834 F.2d 368, 370-71 (3d Cir. 1987)).

At trial, Secret Service Agent Brian Donovan testified that approximately $210,000 in counterfeit notes was recovered directly from the defendants and their co-conspirators and in casino machines which they were playing when found. Lorelei Pagano, a Secret Service Agent expert in the analysis of counterfeit currency, testified that virtually all of the $1.2 million in counterfeit notes, including the $210,000 identified by Agent Donovan, had a "common origin" and were made from a "common source." Supp. App. at 234. Susan Fortunato, another agent expert in the analysis of counterfeit currency, testified that all of the notes comprising the approximately $1.2 million in the possession of the Secret Service had been printed using the same brand of computer equipment purchased by James Taftsiou.

In an attempt to counter this evidence, appellants challenge Agent Pagano's analysis on the ground that she actually examined only a handful of the notes at issue. However, Agent Pagano testified in detail regarding the analysis she employed in identifying the $1.2 million in counterfeit notes as being of common origin. Her testimony was sufficient to support a finding that all $1.2 million originated from a common source. In turn, other evidence in the record, including the testimony of Agents Fortunato and Donovan as well as that of James Taftsiou and several of his co-conspirators, was sufficient to support a finding that the source was the Taftsious.

Moreover, appellants' general assertion that "only a fraction of the $1.2 million charged was directly linked to this case and any related cases" does not demonstrate clear error. Given the district court's finding that the face value of the notes at issue was between $800,000 and $1.5 million, the Taftsious would have to show that Agent Pagano's calculations were off by more than $400,000 — something they have not attempted to do — before they could succeed in proving reversible error. *See* U.S.S.G. § 2F1.1, Appl. Note 8 ("For the purpose of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information.").

Defendants next challenge the $1.2 million loss figure on the ground that "this is the age of technology" and argue they should not "be held accountable for such an amalgam of printed material while the various components are certainly available to millions of people within the ether of the Internet." Appellants' Br. at 27-28. They cite nothing in the record to suggest that copies of their counterfeit bills were available on the Internet or that any of the notes at issue were in fact obtained by anyone from that source. Such wild speculation is inadequate to demonstrate clear error on the part of the district court.

The Taftsious seek some assistance from application note 4 to U.S.S.G. § 2B5.1 which provides, in full, that "[s]ubsection (b)(2) [of § 2B5.1] does not apply to persons who merely photocopy notes or otherwise produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny." They contend that theirs are examples of the "so obviously counterfeit" notes to which the application note is addressed. However, note 4 is limited by its terms to enhancements under subsection (b)(2) of § 2B5.1 while the district court in the case at bar proceeded under subsection (b)(1). Nonetheless, appellants argue that the "same sort of limiting analysis should have been applied to the enhancement under § 2B5.1(b)(1)." Appellants' Br. at 29.

The Sentencing Commission has expressly and unambiguously limited the reach of note 4 to subsection (b)(2), and we are not at liberty to extend its application to other subsections by judicial fiat alone. Accordingly, we find no error in the district court's finding that the face value of the Taftsious' counterfeit currency was between $800,000 and $1.5 million and that appellants' offense level should be increased by 11 levels pursuant to U.S.S.G. §§ 2B5.1(b)(1) and 2F1.1(b)(1)(L).

III.

For the reasons stated above, we will affirm the judgments of conviction and sentence entered by the district court.

Appendix A

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 19, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5409

UNITED STATES OF AMERICA

v.

BARDUL TAFTSIOU,

Appellant

No. 97-5473

UNITED STATES OF AMERICA

v.

JAMES TAFTSIOU
aka James Taft, aka Gezim Taftsiou

James Taftsiou,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. Nos. 95-cr-00681-1, 95-cr-00681-6)

Appendix B

Present: Slotvier and Greenberg, *Circuit Judges*, and Pollak, *District Judge*[*]

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were submitted pursuant to Third Circuit LAR 34.1(a) on May 18, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of said District Court entered June 26, 1997, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: May 19, 1998

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[*] Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JUNE 26, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case Number CR 95-681-02

UNITED STATES OF AMERICA

v.

JAMES TAFTSIOU a/k/a "Gezim Taftsiou", "James Taft"

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on Or After November 1, 1987)

The defendant, JAMES TAFTSIOU a/k/a "Gezim Taftsiou," "James Taft", was represented by Bruce Throckmorton, Esq.

On motion of the United States the court has dismissed the Underlying Indictment.

The defendant was found guilty on count(s) 1 & 4 of Superseding Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Appendix C

Title & Section	Name of Offense	Date Offense Concluded	Count Numbers
18:371	Conspiracy to to pass approximately $1 million in counterfeit Federal Reserve Notes	11/18/95	1
18:473	Dealing counterfeit Federal Reserve Notes	11/10/95	4

As pronounced on 06/18/97, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 100, for count(s) 1 & 4 of Superseding indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed on this 20th day of June 1997

s/ Mary Little Parell
United States District Judge

Appendix C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 54 month on each of Counts One and Four, said terms to be served consecutively.

The Court makes the following recommendations to the Bureau of Prisons: That defendant be placed in the same institution as his defendant, Bardul Taftsiou, as close to his home in New York as possible.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ _____, with a certified copy of this Judgment.

United States Marshal
By _____
Deputy Marshal

Appendix C

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term consists of terms of 3 years each of Counts One and Four, said terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court. The defendant must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer; and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation

Office. He shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report with the last five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

Appendix C

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant not enter into any agreement to act as an informer of a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix C

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following casinos in Atlantic City, New Jersey:

Name of Payee	*Amount of Restitution*
1. Bally's Park Place Casino Hotel and Tower at Park Place and Boardwalk Avenue;	
2. Caesars Atlantic City Hotel and Casino, at 2100 Pacific Avenue;	
3. Claridge Casino Hotel at Indiana Avenue and Boardwalk Avenue	
4. Harrah's Casino Hotel, Atlantic City at 777 Harrah's Boulevard	
5. Merv Griffin's Resorts Casino Hotel, at Boardwalk and North Carolina Avenue;	
6. Trump's Taj Mahal, at 1000 Boardwalk at Virginia Avenue	
7. Sands Hhotal and Casino, at South Indiana Avenue and Brighton Park;	
8. Showboat Casino-Hotel, Atlantic City, at 801 Boardwalk;	

9. The Grand Casino Hotel, Boston at the Boardwalk;

10. Tropicana Casino and Resort, Brighton Avenue and Boardwalk;

11. Trump Plaza Hotel and Casino, Mississippi Avenue and Boardwalk;

12. Trump's Castle Casino Resort, Huron Avenue and Brigatine Boulevard,

Each casino shall receive $2,083.33 for a total amount of $25,000.

Any payment made that is not payment in full shall be divided proportionately among the persons named. The defendant's restitution obligations shall not be affected by any restitution payments that may be made by other defendants in this case.

It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program. Upon release, any outstanding balance is to be paid as a condition of supervised release, in equal monthly installments.

Appendix C

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	24
Criminal History Category:	I
Imprisonment Range:	51 months to 63 months
Supervised release Range:	2 to 3 years
Fine Range:	$10,000 to $100,000
Restitution	$25,000

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, the range exceeds 24 months, and the sentence is imposed for the following reason(s): general and specific deterence, punishment and incapacitation.